

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket Nos. 35216 & 35604

STATE OF IDAHO,)	2009 Unpublished Opinion No. 467
)	
Plaintiff-Respondent,)	Filed: May 20, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
DANA LYDELL SMITH,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Minidoka County. Hon. R. Barry Wood, District Judge.

Judgment of conviction for grand theft, affirmed.

Greg S. Silvey, Kuna, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

PERRY, Judge

Dana Lydell Smith appeals from his judgment of conviction for grand theft. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Smith was charged with grand theft, I.C. §§ 18-2403 and 18-2407, after he and an accomplice broke into a car dealership and Smith stole a truck and a cargo trailer. In response to a state discovery request for the names of any witnesses to testify at trial, Smith stated that no determination had been made at the time of the request, but that he would supplement that response in the future. Smith's trial was delayed for various reasons. No supplement was provided until nearly two years later, when Smith provided a witness list consisting of a psychiatrist who would testify as an expert witness. This witness list was provided five days before the scheduled trial date. The state filed a motion in limine to exclude the testimony of

Smith's expert witness for late disclosure, asserting it was unduly prejudiced because it could not interview the expert before trial or secure its own expert to rebut this testimony.

At the hearing on the motion in limine, Smith also requested a continuance of the trial, arguing that he was mentally unfit to proceed. After hearing argument, the district court found that further investigation was necessary and deferred ruling on the continuance until a mental health evaluation report could be obtained from another jurisdiction later that day. The district court then heard argument on the motion in limine to exclude Smith's expert witness and held that the witness could not testify at trial because of his late disclosure and the undue prejudice caused by the state's inability to adequately prepare for the testimony on such short notice. Later that day, after reviewing the mental health report, the district court granted Smith's motion for a continuance of the trial and ordered that further psychiatric evaluations be performed to determine Smith's ability to understand the proceedings against him and to assist in his own defense.

Smith was found competent to stand trial and a new trial date was set. Prior to the new date for trial, Smith filed an amended witness list which did not include any experts. At trial, Smith did not call any witnesses. A jury found Smith guilty of grand theft, and the district court sentenced him to a unified term of fourteen years, with a minimum period of confinement of seven years. Smith appeals, challenging the district court's exclusion of his expert witness as a sanction for a discovery violation.

II. ANALYSIS

Smith argues that the district court abused its discretion by excluding his expert witness and by failing to weigh the potential prejudice to the state with his right to a fair trial. Additionally, Smith contends that the state would not have suffered any prejudice because of his motion to continue the trial due to his mental incompetency, which the district court granted later that day. The state responds that the district court did not abuse its discretion because it heard argument from both sides as to the potential prejudice that each would suffer if the expert testimony was allowed or excluded. The state contends that the district court properly weighed these considerations and found that the witness should be excluded because of the prejudice to the state. Additionally, the state contends that Smith has not properly preserved his claim that

the state would not have suffered prejudice because the trial was ultimately continued in order to obtain a mental health evaluation.

We review a trial court's determination to exclude a witness for late disclosure for an abuse of discretion. *State v. Siegel*, 137 Idaho 538, 543, 50 P.3d 1033, 1038 (Ct. App. 2002). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989).

Idaho Criminal Rule 16 requires the defendant, upon written request by the prosecuting attorney, to furnish the state a list of names and addresses of witnesses the defendant intends to call at trial. I.C.R. 16(c)(3). After a discovery response is made, if a party decides to use additional evidence or witnesses, there is a continuing duty to promptly disclose that fact to the other party and the court to allow for appropriate requests for additional discovery or inspection. I.C.R. 16(i). The failure to comply with a discovery request is grounds for the imposition of sanctions by the court. I.C.R. 16(e)(2).

A defendant's right to offer testimony, derived from the Compulsory Process Clause of the Sixth Amendment to the United States Constitution, can be violated by the imposition of a discovery sanction that excludes a material defense witness. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988); *State v. Harris*, 132 Idaho 843, 846, 979 P.2d 1201, 1204 (1999). However, the effective functioning of the adversary process requires adherence to rules of procedure which provide each party the fair opportunity to assemble and submit evidence to contradict or explain the opponent's case. *Taylor*, 484 U.S. at 410-11. In determining whether to exclude a witness for late disclosure, a trial court must consider whether the state would be prejudiced from the late disclosure if the evidence were admitted and weigh that prejudice against the defendant's right to a fair trial. *Siegel*, 137 Idaho at 543, 50 P.3d at 1038; *State v. Thomas*, 133 Idaho 800, 802, 992 P.2d 795, 797 (Ct. App. 1999).

Smith claims that the district court never made the required balancing between the prejudice to the state and the prejudice to his right to a fair trial if the expert's testimony was

allowed or excluded. At the hearing on the state's motion in limine to exclude the expert testimony, the state argued:

The issue from our standpoint, Your Honor, is one of surprise and prejudice to the State. We received late last Friday a witness list indicating that [this expert] would be called as a witness. . . . It's our understanding that he'll be called as some kind of an expert in this case, and this late disclosure is extremely prejudicial to the State, given the fact that over two and a half years ago we'd made a request for the defendant to disclose any witnesses that they were going to call in this case and now on the eve of trial they've disclosed [this expert]. It doesn't give the State much opportunity to find out what that's all about and find rebuttal.

It's not like he's a fact witness, its not like it stems from all the other facts in this case. They're calling an expert and that expert's testimony might be something that we need to meet in some way, and we just don't have the ability to deal with it at this point, and because of that prejudice we would ask the court to not allow them to call [this expert] on this case.

Defense counsel responded with an offer of proof, arguing that the state was going to call Smith's accomplice as a witness to testify that Smith gave the accomplice intoxicating substances the night of the crime and the two of them were exhibiting bizarre behavior. Defense counsel further explained that the expert witness would help the jury understand typical chemically-induced behavior compared with behavior resulting from mental impairment. In addition, the witness would testify as to whether the accomplice's testimony was consistent with the type of behavior he alleged. After the state had an opportunity to counter counsel's argument, the district court held: "Okay. I can rule on this one from the bench. I think because of the late disclosure and the potential of unfair prejudice to the State I will exclude the testimony of [this expert]."

Absent from the pre-trial hearing and the district court's ruling was any consideration of the prejudice to Smith's right to a fair trial should the testimony of the expert witness be excluded. The state argues that the district court's consideration of prejudice to Smith was apparent because defense counsel had indicated the subject matter of this testimony and, therefore, the district court understood the impact on the defense from his exclusion. We are not persuaded that the prejudice to Smith's right to a fair trial was properly considered by the district court because neither party nor the district court made any mention of such a consideration.

Witness exclusion for a discovery violation is an extreme remedy. *State v. Albert*, 138 Idaho 284, 289, 62 P.3d 208, 213 (Ct. App. 2002). When confronted with such a determination,

a district court is obligated to also consider less severe alternative remedies, such as a short continuance, a mistrial, or imposition of sanctions on defense counsel. *State v. Saxton*, 133 Idaho 546, 548, 989 P.2d 288, 290 (Ct. App. 1999). This Court has previously disapproved of a discovery sanction when the trial court simply accepted the state's recommended remedy without evaluating whether it penalized the individual responsible for the discovery violation and without considering less severe remedies. *See State v. Winson*, 129 Idaho 298, 303, 923 P.2d 1005, 1010 (Ct. App. 1996). In this case, the record does not show that the district court considered the potential prejudice to Smith's right to a fair trial, whether less severe alternative remedies existed, and whether the remedy of exclusion was narrowly tailored to the party responsible for the discovery violation.¹ Because of our holding, we need not address any of Smith's additional arguments that the district court abused its discretion in excluding his expert witness.

However, our inquiry does not end with our conclusion that the district court abused its discretion by excluding Smith's expert witness as a sanction for a discovery violation. Error is not reversible unless it is prejudicial. *State v. Stoddard*, 105 Idaho 169, 171, 667 P.2d 272, 274 (Ct. App. 1983). With limited exceptions, even constitutional error is not necessarily prejudicial error. *Id.* Thus, we examine whether the alleged error complained of in the present case was harmless. *State v. Lopez*, 141 Idaho 575, 578, 114 P.3d 133, 136 (Ct. App. 2005).

Any defect or irregularity in criminal proceedings, which does not affect substantial rights of the parties, is to be disregarded and does not constitute a ground for reversal. I.C.R. 52; *State v. Brown*, 131 Idaho 61, 70, 951 P.2d 1288, 1297 (Ct. App. 1998). In *Saxton*, this Court held that the district court abused its discretion in imposing a sanction excluding evidence due to a discovery violation, but that the error was harmless because its exclusion did not have any deleterious effect on the fairness of Saxton's trial. *Saxton*, 133 Idaho 546, 548, 989 P.2d 288, 290.

In this case, the district court first ruled on the exclusion of Smith's expert witness. Later that afternoon, however, the district court granted Smith's motion to continue the trial based on his mental incompetency. Trial was continued for seven months until Smith was eventually

¹ We express no opinion regarding the appropriateness of the various remedies available to the district court. We only conclude that the district court abused its discretion by not considering any remedies short of exclusion of the witness, not considering the potential prejudice to Smith's right to a fair trial, and not considering whether its sanction was narrowly tailored to the individual responsible for the discovery violation.

found fit to stand trial. During that seven-month period, Smith made no effort to reinstate his expert witness or file any motion for the district court to reconsider the prejudice to the state since the time constraints of the earlier trial had been removed. Smith also did not seek to include any other expert witness at his trial as evidenced by his amended witness lists filed prior to his trial. In fact, Smith did not call any witnesses to testify at his trial.

During trial, the accomplice did not testify that he was drugged by Smith as defense counsel's offer of proof at the earlier pre-trial hearing alleged. However, the accomplice did testify that he had done some drugs the night of the crime and that he and Smith were looking for drugs. Therefore, the expert testimony that the accomplice's testimony was inconsistent with the bizarre behavior exhibited that night was no longer material. Smith's defense centered around his alleged lack of intent to permanently deprive the owner of his property. Smith's counsel argued that it was a joyride and that Smith's bizarre behavior and hazy recollection of the events of that night showed that he did not know what he was doing and did not have the requisite intent to deprive. The jury did not believe that an altered mental state--regardless of whether it was chemically-induced or a product of mental instability--affected Smith's intent to permanently deprive the owner of his property. Therefore, the exclusion of Smith's expert witness' testimony regarding the typical chemically-induced behavior compared with behavior resulting from mental impairment did not have any deleterious effect on the fairness of Smith's trial. Accordingly, the district court's erroneous exclusion of Smith's expert witness was harmless.

III.

CONCLUSION

The district court abused its discretion by excluding Smith's expert witness as a sanction for a discovery violation because it did not consider the potential prejudice to Smith's right to a fair trial, any less severe alternative remedies, or whether its sanction was narrowly tailored to the person responsible for the discovery violation. However, the district court's error was harmless. Accordingly, Smith's judgment of conviction for grand theft is affirmed.

Chief Judge LANSING and Judge GRATTON, **CONCUR.**